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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ELLIS BERNARD SCOTT,

Defendant and Appellant.

D074334

(Super. Ct. No. SCD272793)

APPEAL from a judgment of the Superior Court of San Diego County,
Laura W. Halgren, Judge. Reversed and remanded with directions.

David W. Beaudreau, under appointment by the Court of Appeal, for Defendant
and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Andrew S.
Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

A jury found Scott guilty of assault with a deadly weapon. (Pen. Code, § 245, subd. (a)(1).)¹ The jury also found that Scott personally used a dangerous and deadly weapon during the offense (§ 1192.7 (c)(23)). In a bifurcated proceeding, Scott admitted having suffered three prior strike convictions (§§ 667, subds. (b)–(i), 668, 1170.12) and two prior serious felony convictions (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c)), and also admitted having served three prior prison terms. (§ 667.5, subd. (b).)

The trial court sentenced Scott to 25 years to life plus 10 years in state prison. Scott's sentence was comprised of 25 years to life pursuant to the Three Strikes law, plus two consecutive five-year terms for the prior serious felony enhancements. The trial court also imposed various fees, a restitution fine, and a parole revocation restitution fine.

Scott's primary claims on appeal are that the prosecutor committed prosecutorial error during rebuttal closing argument by referring to evidence outside of the record, and that defense counsel provided ineffective assistance in failing to object to the prosecutor's argument. We conclude that Scott forfeited this claim of prosecutorial error by failing to object to the prosecutor's argument, and that Scott's related ineffective assistance of counsel claim fails for lack of prejudice.

Scott also requests that the matter be remanded for a hearing at which the trial court may exercise its discretion to grant mental health diversion (§ 1001.36), in light of a

¹ Unless otherwise specified, all subsequent statutory references are to the Penal Code.

retroactive change in the law. In addition, Scott requests that the matter be remanded to permit the trial court to exercise its discretion with respect to whether to strike Scott's two serious felony enhancements (§667, subd. (a)(1)) due to another retroactive change in the law. Finally, citing *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), Scott claims that the trial court erred in imposing a court operations fee, criminal conviction fee, booking fee, and restitution fines without first determining his ability to pay.

We conclude that Scott is entitled to a remand for further proceedings in the trial court, given changes in the law. We reverse the judgment and remand the matter to the trial court with directions to conduct a mental health diversion eligibility hearing under section 1001.36. If the trial court determines that Scott is ineligible for diversion, or, if the court places Scott on diversion but he does not successfully complete diversion, then the court shall reinstate Scott's conviction² and resentence him. During any resentencing proceedings, the trial court shall consider whether to exercise its discretion to strike either or both of the prior serious felony enhancements (§ 667, subd. (a)(1)).³

² In discussing the reinstatement of Scott's conviction throughout this opinion, we intend to refer to the jury's finding of guilt on the underlying charge, the jury's true finding on the personal use allegation, and the trial court's true findings on the strike, serious felony, and prison prior allegations.

³ For reasons that we explain in part III.D, *post*, we reject Scott's *Dueñas* claim.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The People's evidence*

One summer afternoon in 2017, the victim, who was homeless, was at a park in City Heights. The victim was seated on the ground next to several other people. On the ground, next to the victim, was a golf club that the victim had brought to the park. The victim testified that he brought the golf club to the park because he intended to use it to threaten an individual who had been "messaging with [his] sister."

Scott, who also was at the park, walked up to the group and approached the victim. Scott picked up the golf club. Seconds later, Scott swung the club and struck the victim in the head. Scott then swung the club at the victim a second time, striking the victim in the face and on his arms. The victim had not said or done anything to Scott prior to being hit.

A security guard at a recreation center located in the park saw Scott strike the victim with the golf club. The security guard called 911. After striking the victim, Scott was "ranting and raving" and appeared to be angry and upset. The guard did not see the victim acting aggressively either before or after being struck with the club. Police arrived at the scene minutes later and detained Scott.

Surveillance video of the incident was shown to the jury.

B. *The defense*

Scott's former girlfriend, Maria Perez, testified that she was with Scott at the park on the day of the incident.⁴ Scott went near the restrooms. While Scott was near the restrooms, several people, including the victim, directed racial epithets at Scott. Perez saw two people throw punches at Scott.

Scott testified that he was at the park on the day of the charged offenses and that he went to use the restroom at the park. As he approached the restroom, he was confronted by several men, including the victim. According to Scott, the victim swung his fist at Scott, who backed away quickly. Another man with a tattoo indicating his affinity for white supremacy asked Scott, "What's up now, motherfucker?" Scott backed out of the bathroom.

A few minutes later, Scott approached the men with whom he had the encounter by the restroom. The men continued to insult Scott. According to Scott, as he walked by, someone said, "Get his ass now." Scott thought that the victim was going to grab the golf club and hit Scott with it. Fearing an attack, Scott grabbed the club and struck the victim with the club.

⁴ Due to her unavailability, Perez's prior testimony from a previous trial in the case that resulted in a mistrial was read into the record at the trial.

III.

DISCUSSION

A. *Scott forfeited his claim of prosecutorial error; Scott's related claim of ineffective assistance of counsel fails for lack of prejudice*

Scott claims that the prosecutor committed prosecutorial error during his rebuttal closing argument by referring to evidence outside of the record. In the alternative, Scott claims that defense counsel provided ineffective assistance in failing to object to the prosecutor's argument.

1. *Factual and procedural background*

During his closing argument, defense counsel argued that Scott had acted in self-defense. During this argument, defense counsel stated the following:

"The fact that Mr. Scott didn't, you know, leave the park after this happened and was cooperative with the police is also circumstantial evidence that he was using self-defense.

"I mean, if he had really just randomly, or purposefully, decided that he was going to take out [the victim], then why would he stay around? Everyone knows there's a police station directly across the street. It's only going to take [a] minute or two for them to respond. If you actually are swinging this club maniacally at someone to injure them and you have no legal excuse for doing so, you're not going to stick around and wait for the police to come. You're going to take off.

"That's not what Mr. Scott did. Again that's circumstantial evidence that he was acting in self-defense."

During his rebuttal closing argument, the prosecutor responded to defense counsel's argument by stating the following:

"Counsel was getting up here and saying, 'Well, yeah, he stayed at the park so that shows he knew it was self-defense.' No.

"Also look at — *first of all, people do that all the time. That's how the cops catch people.*

"Beyond that, what — how reasonable is the evidence with his testimony? That he's claiming that he is so scared that they're going to kill him — look at his body language. Is he acting like someone that's scared?

"Is it reasonable for someone who was truly threatened, who is truly fearful for their life, to just hang out? That's not reasonable. That's not reasonable because he was not in danger. He was not being threatened. His behavior is inconsistent with someone who is fearful for their life." (Italics added.)

2. *Scott forfeited his claim of prosecutorial error*

Scott contends that the italicized portion of the prosecutor's rebuttal argument quoted in part III.A.1, *ante*, constituted prosecutorial error because there was no evidence in the record supporting the prosecutor's statements.

a. *Substantive law*

"The use of deceptive or reprehensible methods to persuade the jury constitutes [prosecutorial] misconduct."⁵ (*People v. Sanchez* (2016) 63 Cal.4th 411, 475.) " ' "A prosecutor's misconduct violates the Fourteenth Amendment to the United States Constitution when it 'infects the trial with such unfairness as to make the conviction a denial of due process.' [Citations.] In other words, the misconduct must be 'of sufficient significance to result in the denial of the defendant's right to a fair trial.' [Citation.] A

⁵ While courts often use the term prosecutorial *misconduct*, we refer to the claim as raising one of purported prosecutorial *error*. (See *People v. Potts* (2019) 6 Cal.5th 1012, 1036 ["A claim of prosecutorial misconduct may have merit even absent proof that a prosecutor had 'a culpable state of mind.' [Citation.] For this reason, '[a] more apt description of the transgression is prosecutorial error' ".])

prosecutor's misconduct that does not render a trial fundamentally unfair nevertheless violates California law if it involves 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " " " (*People v. Covarrubias* (2016) 1 Cal.5th 838, 894.)

" " "[S]tatements of facts not in evidence by the prosecuting attorney in his argument to the jury constitute misconduct." " " (*People v. Rivera* (2019) 7 Cal.5th 306, 382 (*Rivera*).)

b. *Forfeiture*

In *People v. Forrest* (2017) 7 Cal.App.5th 1074, 1081, the Court of Appeal discussed well-established law regarding what a defendant must do in order to preserve a claim of prosecutorial error for appellate review:

"To preserve a misconduct claim for review on appeal, ' "a defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument." ' "[Citations.] The underlying purpose of this requirement is to ' " 'encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had ' " ' [Citation.] 'The objection requirement is necessary in criminal cases because a "contrary rule would deprive the People of the opportunity to cure the defect at trial and would 'permit the defendant to gamble on an acquittal at his trial secure in the knowledge that a conviction would be reversed on appeal.' " " '[Citation.]"

A claim of prosecutorial error is reviewable on appeal notwithstanding the lack of a timely objection if an admonition would not have cured the harm resulting from the prosecutor's remarks. (See, e.g., *People v. Cunningham* (2001) 25 Cal.4th at pp. 1000–1001.)

c. *Application*

Defense counsel made no objection at trial to the portion of the prosecutor's rebuttal argument that Scott challenges on appeal, and Scott does not contend on appeal that the asserted prosecutorial error could not have been cured by an admonition.

Scott requests that we exercise our discretion to consider his unpreserved claim because his contention is "important" and provides "a textbook case" of misconduct. He also argues that we should review his unpreserved claim because he received a lengthy prison sentence under the Three Strikes law. Neither of Scott's arguments provides a compelling basis for excusing Scott's forfeiture and we decline to exercise our discretion to consider Scott's claim on appeal.⁶ However, we address below Scott's related claim that his counsel rendered ineffective assistance in failing to object to the prosecutor's rebuttal closing argument.

3. *Scott fails to establish that he suffered prejudice from defense counsel's failure to object to the prosecutor's argument, as is necessary to establish a claim of ineffective assistance of counsel*

Scott claims that defense counsel rendered ineffective assistance in failing to object to the prosecutor's rebuttal closing argument quoted in part III.A.1, *ante*.

a. *Relevant law governing ineffective assistance of counsel claims*

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient in that it "fell below an objective standard of

⁶ If we were to exercise our discretion to consider Scott's claim, we would conclude that the prosecutorial error of which Scott complains was harmless, for the reasons outlined in connection with our rejection of Scott's related ineffective assistance claim.

reasonableness," evaluated "under prevailing professional norms." (*Strickland v. Washington* (1984) 466 U.S. 668, 688 (*Strickland*); accord, *People v. Ledesma* (1987) 43 Cal.3d 171, 216.) The defendant must also show that it is reasonably probable that a more favorable result would have been reached absent counsel's deficient performance. (*Strickland, supra*, at p. 694.)

"[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland, supra*, 466 U.S. at p. 697.)

b. *Application*

The prosecutor's remark that "people do that [i.e., remain at crime scenes] all the time," was improper because there was no evidence in the record with respect to this issue. (See *Rivera, supra*, 7 Cal.5th at p. 335 [improper for prosecutor to make " 'statement[] of facts not in evidence" ' "].)

However, we need not determine whether defense counsel rendered ineffective assistance in failing to object to the prosecutor's remark because we conclude that it is not reasonably probable that Scott would have achieved a more favorable result even if defense counsel had objected. (See *Strickland, supra*, 466 U.S. at p. 697 [claims of ineffective assistance of counsel fail in the absence of a showing of prejudice].)

To begin with, the prosecutor's statement was a "brief and isolated remark," (*People v. Cudjo* (1993) 6 Cal.4th 585, 626.) The remainder of the prosecutor's opening

and rebuttal closing arguments focused on the compelling evidence of Scott's guilt, including video evidence of the incident, eyewitness testimony, and inconsistencies in defense witnesses's statements.⁷ Further, the argument to which the prosecutor was responding—i.e., defense counsel's contention that the fact that Scott remained at the scene constituted circumstantial evidence that Scott had acted in self-defense—was a very minor portion of defense counsel's closing argument.⁸

Further, the trial court instructed the jury as follows: "Nothing that the attorneys say is evidence. In their opening and closing arguments, the attorneys discuss the case, their remarks are not evidence." The court also instructed the jury that it was to decide the case "only on the evidence that has been presented to you in this trial." Since we "presume the jury followed these instructions," (*People v. Avila* (2009) 46 Cal.4th 680,

⁷ In addition, immediately after making the improper argument, the prosecutor offered a second response to defense counsel's argument, which *was* rooted in the evidence—i.e., that the fact that Scott stayed at the park was inconsistent with Scott's testimony that he feared for his life at the time of the incident. The fact that the jury was provided with a proper argument rooted in the evidence makes it less likely that they rejected defense counsel's argument in reliance on the improper argument.

⁸ We reject Scott's unsupported assertion that "[t]he defense case on credibility primarily rested on [the] inference" that Scott was credible because he had not fled the park after the incident. Defense counsel argued that Scott was credible for numerous *other* reasons, apart from Scott having remained at the park after his commission of the charged offense. For example, defense counsel argued that the surveillance video of the incident did not have audio and that both Perez and Scott testified that the victim's group had threatened Scott. Defense counsel argued that Scott was more credible than the victim because the victim had brought a golf club to the park for the purpose of attacking someone who had been bothering the victim's sister. Defense counsel also maintained that the fact that Scott had not "embellish[ed] the story" about the incident supported his credibility. Contrary to Scott's contention on appeal, defense counsel's brief remark that Scott remained at the park for a few minutes after the incident until police arrived did not constitute a major portion of defense counsel's argument that Scott was credible.

719), such instructions mitigated any potential for prejudice stemming from the prosecutor's remarks. (*Ibid.* [rejecting claim of prosecutorial error premised on prosecutor's argument "not supported by any facts in the record," in part because jury was instructed that " '[s]tatements made by the attorneys during the trial are not evidence' "].)

In addition to the fact that the prosecutor's brief remark was a very minor part of the trial, an assessment of the remainder of the trial supports the conclusion that Scott has failed to establish prejudice from defense counsel's failure to object to the remark. While Scott contends that this was a "close case," the record belies that contention. The People presented compelling, if not overwhelming, evidence of Scott's guilt.

To begin with, at trial, the People played for the jury extremely inculpatory video evidence of Scott committing the charged offense.⁹ People's Exhibit 3 is an approximately 33-second-long video clip showing Scott striking the victim with the golf club. In the video, a man, later determined to be Scott, walks over to a group of people at

⁹ The exhibits containing the videos have been transferred to this court.

a park. The victim is sitting on the ground with a group of people. Scott reaches down and picks up an object, later determined to be a golf club. Scott aggressively hits the victim on the back of the head or neck area with the golf club. Seconds later, with the victim still on the ground, Scott hits the victim with the club a second time. People from the victim's group start to hurriedly walk and run away.

People's Exhibit 2 is an approximately eight-minute-long video clip depicting approximately two and a half minutes before the commission of the charged offense, and approximately five and a half minutes after its commission. For the entire two and a half minutes before Scott hits the victim in the back of the head with a golf club, the victim is seated on the grass. Approximately twenty seconds before the beating, Scott walks over to the victim's group. Scott circles around the group briefly before picking up the golf club and striking the victim with it. After the beating, Perez runs to Scott. Perez appears to attempt to restrain Scott. Several individuals who had been near the victim at the time of the beating begin to walk or run away from the area. Scott briefly walks toward these individuals. Approximately 45 seconds after hitting the victim twice with the golf club, Scott returns to the victim, who is now standing. Scott appears to hit the victim in the face with his hand or fist. Scott can then be seen walking around the park until police arrive at the scene approximately five and a half minutes after the offense.

In addition to this video evidence, the victim and another eyewitness¹⁰ both testified that Scott's beating of the victim with a golf club was unprovoked.¹¹ Scott acknowledged at trial that he had hit the victim with a golf club.

Further, we agree with the People that Scott's testimony that he acted in self-defense after being assaulted by the victim near the restroom in the park a few minutes before he struck the victim with a golf club lacked credibility, for numerous reasons. To begin with, Scott did not tell police about the alleged incident in the restroom on the day of the charged offenses, either at the scene or during an interview at the police station. When asked at trial whether this would have been important information to tell the police, Scott responded, "Yes. If I was a snitch, yes." Yet, Scott admitted at trial that he *did* tell police that the victim had allegedly swung the golf club at him. During his testimony at trial, Scott acknowledged that the victim had *not* in fact swung the golf club at him.¹² Further, even assuming that the jury were to have believed Scott's testimony about the alleged assault in the restroom, a reasonable juror would not have found that Scott's act in beating the victim with a golf club during a separate incident several minutes later constituted self-defense.

¹⁰ The eyewitness was acquainted with the victim and had been seated near him at the park at the time of the attack.

¹¹ The victim, who was struck from behind, testified, "I think somebody hit me with a stick or club or something."

¹² The video clips shown at trial demonstrated that the victim had not swung the golf club at Scott.

To that end, we disagree with Scott's assertion that "the surveillance video did not corroborate or contradict Scott's self-defense claim." The jury was instructed that, in order for Scott to have acted in self-defense, he had to have believed that he was in "imminent danger," and that the "immediate use of force was necessary to defend against that danger." In addition, he must have used "no more force than was reasonably necessary." The jury was also instructed that the "[r]ight to use force in self-defense continues only as long as the danger exists, or reasonably appears to exist." Thus, even assuming, strictly for the purpose of argument, that the jury believed Scott's testimony that the victim had attempted to punch him in the restroom, it is not reasonably probable that the jury would have found that Scott acted in self-defense in approaching the seated victim several minutes *after* the alleged restroom incident,¹³ picking up a golf club, violently striking the seated victim in the back of the head with the golf club, and striking the victim in the head with the club a second time.

We are not persuaded that Perez's former testimony in which Perez testified that Scott had been assaulted near the park restroom prior to Scott's use of the golf club, supports a finding of prejudice. The People called a defense investigator as a witness at this trial. The investigator testified that Perez had told him that the victim and Scott

¹³ At trial, when asked how long before the charged offense the alleged restroom incident had occurred, Scott stated, "Well, from there, actions — things moved very, very rapid after that. It was quickly. So I wouldn't — really time lapse I wouldn't know whether it was two minutes, five, ten, I'm not sure, but it happened very quickly after that." As noted in the text, the People showed a video at trial that showed the victim seated on the grass of the park for the two and a half minutes prior to Scott's striking of the victim with the golf club.

began to hit each other just before Scott swung a golf club at the victim. The investigator also testified that Perez had never told him about a separate incident between Scott and the victim occurring near the park restroom. The description of the incident that Perez related to the investigator was inconsistent with her former testimony and was contrary to video evidence that was shown to the jury.¹⁴ Further, as with Scott's testimony, even if the jury believed that Perez had been truthful in testifying that Scott was assaulted near the park restroom several minutes before he attacked the victim, the jury was unlikely to find that Scott's later act in beating the seated victim in the back of the head with a golf club constituted self-defense.

Thus, while we agree with Scott that the jury was required to make a "credibility determination[]," it is clear that the jury determined that Scott's testimony was not credible. In light of the evidence discussed above, it is not reasonably probable that the jury would have reached a different determination as to Scott's credibility if defense counsel had objected to the prosecutor's remark.

Finally, we are unpersuaded by Scott's claim that prejudice is demonstrated by the fact that the jury in a prior trial was unable to reach a verdict. Scott fails to demonstrate that the evidence presented at the two trials was materially similar. In fact, the evidence presented at the trials was materially *different*, since *neither* Scott *nor* the victim testified at the prior trial. Accordingly, the fact that the prior jury was unable to reach a verdict does not demonstrate prejudice resulting from defense counsel's failure to object to the

¹⁴ Perez stated during her former testimony that she was unaware of the existence of a video recording of the incident.

prosecutor's remark in rebuttal closing argument. (See *In re Richards* (2016) 63 Cal.4th 291, 316 (conc. opn. by Corrigan, J.) ["Particularly when the split is 11 to one,¹⁵] as it was in the second trial here, the disagreement may be driven as much by the personality of a juror, a uniquely held world view, or even some friction during deliberations, as by any weakness in the underlying case"].)

Accordingly, we conclude that Scott has not demonstrated that he suffered prejudice as a result of defense counsel's failure to object to the prosecutor's statement in his rebuttal closing argument, and that he has therefore failed to establish a claim of ineffective assistance of counsel.

B. *Scott is entitled to have the trial court consider placing him on mental health diversion under a newly-enacted statute that became effective before the judgment in his case became final*

Scott contends that, due to a change in the law, he is entitled to a conditional reversal of the judgment and a remand to allow the trial court to determine whether to place him on mental health diversion under newly-enacted section 1001.36. That statute authorizes trial courts to permit qualifying defendants to participate in pretrial diversion and to receive mental health treatment in lieu of prosecution. (*Id.*, subd. (c).)

¹⁵ The record from the prior trial indicates that that the jury was split 11-1 in the prior case, with eleven jurors favoring a verdict of guilt.

1. *Background regarding pretrial diversion*

Sections 1001.35 and 1001.36¹⁶ authorize pretrial diversion for defendants with mental disorders. " '[P]retrial diversion' means the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment" (§ 1001.36, subd. (c).) A court may grant pretrial diversion under section 1001.36 if the court finds that: (1) the defendant suffers from an identified mental disorder; (2) the mental disorder played a significant role in the commission of the charged offense; (3) the defendant's symptoms will respond to treatment; (4) the defendant consents to diversion and the defendant waives his or her speedy trial rights; (5) the defendant agrees to comply with treatment; and (6) the defendant will not pose an unreasonable risk of danger to public safety, as defined in section 1170.18, if the defendant is treated in the community. (§ 1001.36, subd. (b)(1).)

If the court grants pretrial diversion, "[t]he defendant may be referred to a program of mental health treatment utilizing existing inpatient or outpatient mental health resources" for "no longer than two years." (§ 1001.36, subds. (c)(1)(B) & (c)(3).) If the defendant performs "satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings at the time of the initial diversion." (*Id.*, subd. (e).)

¹⁶ Sections 1001.35 and 1001.36 were initially adopted in 2018 and became effective June 27, 2018. (Stats. 2018, ch. 34, § 24, eff. June 27, 2018.) Section 1001.36 was subsequently amended by way of a second statute, also adopted in 2018. (Stats. 2018, ch. 1005, § 1, eff. Jan. 1, 2019.)

2. *Retroactive application of the pretrial diversion statutes*

Courts generally presume that laws apply prospectively. (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 307 (*Lara*)). However, the Legislature may explicitly or implicitly enact laws that apply retroactively. (*Ibid.*) To determine whether a law applies retroactively, we must determine the Legislature's intent in enacting the law. (*Ibid.*)

" 'When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final.' " (*Lara, supra*, 4 Cal.5th at p. 307, quoting *In re Estrada* (1965) 63 Cal.2d 740, 745 (*Estrada*)). " 'The *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not. ' [Citations.]" (*Lara, supra*, at p. 308.)

We conclude that the *Estrada* rule applies to section 1001.36 because section 1001.36 makes an ameliorative change to the law in that it has the effect of potentially lessening the punishment for an offense by providing a defendant the possibility of being

placed on diversion and the dismissal of criminal charges upon successful completion of a diversion program. (See e.g., *People v. Frahs* (2018) 27 Cal.App.5th 784, 791 (*Frahs*), review granted Dec. 27, 2018, S252220.) In addition, a determination that section 1001.36 should be applied retroactively is consistent with the statute's stated purpose, which is to promote "[i]ncreased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety." (§ 1001.35, subd. (a).)

There is nothing in the statutory language that indicates that the Legislature did not intend to extend the potential benefits of section 1001.36 as broadly as possible, including to all defendants whose judgments are not final. Although the statute refers to "*pretrial* diversion," (italics added) which is defined to mean the postponement of prosecution at any point during the judicial proceeding, from accusation to adjudication (*id.*, subd. (c)), we do not interpret the reference to "pretrial diversion" as being a sufficiently clear statement that the Legislature intended for the statute to apply only prospectively. (See *People v. Dehoyos* (2018) 4 Cal.5th 594, 600 [" '[A]n amendatory statute lessening punishment is presumed to apply in all cases not yet reduced to final judgment as of the amendatory statute's effective date' [citations], unless the enacting body 'clearly signals its intent to make the amendment prospective, by the inclusion of either an express saving clause or its equivalent' "].) Rather, as the *Frahs* court explained, "The fact that mental health diversion is available only up until the time that a defendant's case is 'adjudicated' is simply how this particular diversion program is ordinarily designed to operate. Indeed, the fact that a juvenile transfer hearing under

Proposition 57 ordinarily occurs prior to the attachment of jeopardy, did not prevent the Supreme Court in *Lara, supra*, 4 Cal.5th 299, from finding that such a hearing must be made available to all defendants whose convictions are not yet final on appeal." (*Frahs, supra*, 27 Cal.App.5th at p. 791; but see, e.g., *People v. Craine* (2019) 35 Cal.App.5th 744 (*Craine*), review granted Sept. 11, 2019, S256671 [disagreeing with *Frahs* and concluding that the fact that "pretrial diversion is literally and functionally impossible once a defendant has been tried, found guilty, and sentenced," constitutes "a clear indication the Legislature did not intend for section 1001.36 to be applied retroactively"].)

The fact that the Supreme Court decided *Lara* before the Legislature enacted section 1001.36 provides further support for our conclusion that the Legislature intended section 1001.36 to apply retroactively; the Legislature is deemed to have been aware of the *Lara* decision (see *People v. Overstreet* (1986) 42 Cal.3d 891, 897). If the Legislature had intended for the courts to apply section 1001.36 in a manner different from the statute addressed in *Lara*, we would have expected the Legislature to have expressed this intent clearly and directly, rather than obscurely and indirectly. (See *In re Pedro T.* (1994) 8 Cal.4th 1041, 1049 [to counter the *Estrada* rule, the Legislature must "demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it"].)

We therefore conclude that section 1001.36 applies retroactively to Scott's case, which was not final at the time section 1001.36 became effective.¹⁷

3. *Scott is entitled to a conditional reversal and remand for the trial court to consider whether to place him on diversion under section 1001.36*

In *Frahs*, the court concluded that a conditional reversal and remand with directions for the trial court to consider whether to place a defendant on diversion under section 1001.36 is appropriate when the "the record affirmatively discloses that [the defendant] appears to meet at least one of the threshold requirements." (*Frahs, supra*, 27 Cal.App.5th at p. 791.)

Scott filed a statement in mitigation and a *Romero*¹⁸ motion that stated as follows:

"Mr. Scott has accepted he does have mental health issues and that self-medicating with illegal controlled substances leads to criminal activity. Dr. David DeFrancesco diagnosed Mr. Scott with depressive disorder and believes that being under the influence of PCP at the time of the offense contributed to his paranoia and . . . if Mr. Scott addresses his depression, abstains from controlled

¹⁷ We recognize that there is a split of authority concerning the retroactivity of section 1001.36. (Compare, e.g., *People v. Hughes* (2019) 39 Cal.App.5th 886, 896, review granted Nov. 26, 2019, S258541; *People v. Burns* (2019) 38 Cal.App.5th 776, 788–789 (*Burns*), review granted Oct. 30, 2019, S257738; and *People v. Weaver* (2019) 36 Cal.App.5th 1103, 1120–1122, review granted Oct. 9, 2019, S257049 [following *Frahs*] with *People v. Torres* (2019) 39 Cal.App.5th 849, 855 and *People v. Khan* (2019) 41 Cal.App.5th 460, 493 [following *Craine*].) For the reasons stated in the text, we follow *Frahs*.

¹⁸ (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*) [concluding that trial courts may exercise their discretion to dismiss a prior strike conviction pursuant to section 1385].)

substances, and surrounds himself with a positive support network, he can avoid future problems."¹⁹

Scott's statement in mitigation / *Romero* motion also provided:

"Mr. Scott suffers from a combination of mental health and substance abuse issues. He has been hearing voices and becoming increasingly paranoid over the past two years. He has, however, shown an ability to remain law abiding when he receives proper treatment. Dr. Francesco diagnosed him with depressive disorder and opined that proper mental health and substance abuse treatment will assist Mr. Scott integrating back to society."

In addition, the probation report in this case states as follows:

"[Scott] has never been diagnosed with any psychological disorders^[20] however, he suspects he does suffer from bipolar disorder or schizophrenia. He has reoccurring nightmares, he hears 'disturbing things,' and sleep is 'problematic' for him. He suffers from 'paranoia and suspicion.' He went to a local clinic to receive mental health service, but departed to Oklahoma City in 2017 before he was seen by a specialist."

Thus, there are statements in the record indicating that Scott may "suffer[] from an identified mental disorder," (§ 1001.36, subd. (b)(1)(A)) . . . [that] would respond to mental health treatment." (*Id.*, subd. (b)(1)(C).) Accordingly, we conclude that the record indicates that Scott may meet at least one of the threshold requirements for

¹⁹ Scott's statement indicated that he had separately filed Dr. Francesco's psychological evaluation with the trial court. Although Scott's appellate counsel failed to ensure that Dr. Francesco's evaluation was transmitted to this court, the People do not dispute that Scott's description of the evaluation is inaccurate.

²⁰ The probation report does not discuss Dr. Francesco's evaluation. The probation report was filed June 25, 2018. Scott's statement in mitigation (which refers to Dr. Francesco's evaluation) was filed on June 22, 2018.

granting diversion, and that a condition reversal and remand under *Frahs* is therefore proper.

4. *The People's arguments against conditional reversal and remand are not persuasive*

The People contend that, even if this court concludes that section 1001.36 applies retroactively,²¹ this court should nevertheless refuse to remand the matter to the trial court, for several reasons. First, the People argue that Scott forfeited any challenge to the trial court's failure to order diversion. In support of this contention, the People note that the law amending section 1001.36 to authorize diversion first became effective on June 27, 2018²²—two days *prior* to June 29, 2018 Scott's sentencing—and that Scott did not request that the court place him on diversion at sentencing. Relatedly, the People contend that the trial court was "presumably aware of the new law" when it sentenced Scott. We elect to exercise our discretion to consider Scott's claim notwithstanding any possible forfeiture. (See *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6 (*Williams*) [stating that an appellate court generally has discretion to consider unpreserved claims].)

The People also contend that Scott is "statutorily ineligible" to be placed on diversion because he received a sentence pursuant to the Three Strikes law, which rendered him ineligible for probation or a suspended sentence. (See § 667, subd. (c) ["Notwithstanding any other law, if a defendant has been convicted of a felony and it has

²¹ The People do not contend that section 1001.36 does not apply retroactively pursuant to *Estrada*.

²² (See Stats. 2018, ch. 34, § 24, eff. June 27, 2018.)

been pled and proved that the defendant has one or more prior serious or violent felony convictions as defined in subdivision (d) [¶] . . . [¶] (2) Probation for the current offense shall not be granted, nor shall execution or imposition of the sentence be suspended for any prior offense").) This argument fails for the fundamental reason that the remedy prescribed by *Frahs* is a conditional *reversal* of the judgment and a remand to permit the trial court to grant diversion and thereby *avoid* the imposition of a sentence. (*Frahs, supra*, 27 Cal.App.5th at p. 796.) Thus, if we were to grant Scott relief under *Frahs*, Scott would not in fact have a Three Strikes sentence. As the *Frahs* court explained, in determining whether to grant diversion, the trial court must "treat the matter as though [Scott] had moved for pretrial diversion after the charges had been filed, but *prior to their adjudication.*" (*Id.* at p. 792, italics added.) Thus, the fact that the trial court sentenced Scott pursuant to the Three Strikes law in this case does not render him ineligible for pretrial diversion under section 1001.36.²³ (See *Burns, supra*, 38 Cal.App.5th at p. 789 [rejecting argument that remand under section 1001.36 "would be

²³ In *Frahs*, the defendant was sentenced pursuant to the Three Strikes law, and the court nevertheless conditionally reversed the judgment and remanded:

"If the trial court finds that Frahs suffers from a mental disorder, does not pose an unreasonable risk of danger to public safety, and otherwise meets the six statutory criteria (as nearly as possible given the postconviction procedural posture of this case), then the court may grant diversion. If Frahs successfully completes diversion, then the court shall dismiss the charges. However, if the court determines that Frahs does not meet the criteria under section 1001.36, or if Frahs does not successfully complete diversion, then his convictions and sentence shall be reinstated. *The judgment shall include the prior 'strike' conviction,*" (*Frahs, supra*, 27 Cal.App.5th at p. 792, italics added.)

futile because the 'Three Strikes' law bars suspending a striker's sentence (§ 667, subd. (c)(2))" because "[t]he *Frahs* procedure conditionally reverses both the convictions and the sentence"].)

Finally, the People contend that "the trial court already rejected [Scott's] mental health defense." (Boldface omitted.) In support of this contention, the People maintain that the trial court was "not convinced [Scott's] actions would not 'happen in the future and other public members would be in danger.'" The People also argue that "it is not conceivable" that the trial court would grant diversion on remand given the lengthy prison sentence that the court imposed. However, the trial court made this observation about Scott's dangerousness and imposed Scott's sentence without, as Scott argues, "a fully developed factual record concerning section 1001.36, subdivision (b)(1)'s eligibility criteria." Scott is entitled to a remand during which the trial court may consider whether to grant diversion on a fully developed record.

In short, we conclude that the People have not presented any persuasive arguments against permitting the trial court to determine whether to grant Scott diversion. In remanding the case, we express no view as to whether the trial court should ultimately conclude that Scott qualifies for diversion under section 1001.36 or, if he does qualify, whether the court should exercise its discretion to place Scott on diversion. We conclude only that section 1001.36 applies retroactively, and that it is for the trial court to determine in the first instance whether the statute applies and if so, whether to exercise its discretion to place Scott on diversion under the statute.

C. *If the trial court declines to place Scott on diversion after holding a mental diversion eligibility hearing under section 1001.36, or if the court places Scott on diversion but Scott fails to successfully complete diversion, then the court shall reinstate Scott's conviction and resentence Scott; in imposing sentence, the court shall consider whether to exercise its discretion to strike either or both of the serious felony enhancements (§ 667, subd. (a)(1)), in light of the law as amended effective January 1, 2019*

Scott claims that the matter should be remanded so that the trial court may consider whether to exercise its discretion to strike his two prior serious felony enhancements under section 667, subdivision (a)(1), as amended by Senate Bill No. 1393 (S.B. 1393), chapter 1013. The People concede that the amended law applies retroactively to Scott's case, but contend that remand is not required because the record indicates that the trial court would not have sentenced Scott differently under the new law.

1. *The change in the law*

On September 30, 2018, the Governor signed S.B. 1393 which became effective on January 1, 2019. S.B. 1393 amended sections 667, subdivision (a) and 1385, subdivision (b) to allow a trial court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1–2.) Under previous versions of these statutes, a trial court was *required* to impose a five-year consecutive term for "any person convicted of a serious felony who previously has been convicted of a serious felony" (former § 667, subd. (a)(1)), and the court had no discretion "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." (Former § 1385, subd. (b).)

2. *The change in the law applies retroactively*

Scott contends that S.B. 1393 applies retroactively to all cases or judgments of conviction in which a five-year term was imposed at sentencing, based on a prior serious felony conviction, provided that the judgment of conviction was not final at the time S.B. 1393 became effective on January 1, 2019. The People concede that the law applies retroactively to Scott's case.

In *People v. Garcia* (2018) 28 Cal.App.5th 961 (*Garcia*), another division of this district held that "it is appropriate to infer, as a matter of statutory construction, that the Legislature intended [S.B.] 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when [S.B.] 1393 becomes effective on January 1, 2019." (*Id.* at p. 973.) We agree with the *Garcia* court's analysis, as well as with its conclusion, and we therefore accept the People's concession that the amendments of S.B. 1393 apply retroactively to Scott's case.

3. *Upon any resentencing, the trial court shall determine whether to exercise its discretion to strike one or both of the serious felony enhancements*

Scott argues that remand is required to permit the trial court to determine whether to exercise its discretion to strike one or both of Scott's serious felony enhancements.

" '[W]hen the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise that sentencing discretion at a new sentencing hearing.' " (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) Remand is not required, however, if "the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the previously mandatory] enhancement." (*Ibid.*)

The People contend that remand is not required on this issue because the record demonstrates that the trial court would not have stricken the five-year enhancements, even if it had possessed discretion to do so. In support of this contention, the People note that, at sentencing, the court declined to strike any of Scott's prior strikes, and made several comments concerning Scott's dangerousness and his prior violent history.

The trial court did make a number of comments discussing Scott's serious criminal record in denying Scott's request to strike two of his prior strikes.²⁴ However, unless the record contains a clear indication that the trial court would not have stricken the *prior serious felony conviction enhancements*, remand is required. On that issue, the record is silent.

In sum, after carefully reviewing the record, we see no clear indication that the trial court would not have stricken the serious felony enhancements if it had been authorized to do so. We therefore conclude that, in the event that the trial court declines to place Scott on diversion after holding a mental health diversion hearing under section 1001.36 (see pt. III.B, *ante*), or if the court grants Scott diversion but he fails to successfully complete the diversion, the trial court shall reinstate Scott's conviction and resentence him. Upon any resentencing, the court shall consider whether to exercise its

²⁴ Scott requested that the trial court strike two of his three prior strikes, and impose an 18-year determinate sentence.

discretion with respect to whether to strike either or both of the five-year prior serious felony enhancements.²⁵

D. *The trial court did not violate Scott's right to due process in imposing various fees and a restitution fine without determining his ability to pay*

Scott contends that the trial court violated his right to due process in imposing a \$40 court operations fee, a \$30 criminal conviction fee, a \$154 booking fee and a \$300 restitution fine without first determining his ability to pay.

1. *Factual and procedural background*

Prior to Scott's sentencing, the probation officer filed a probation report recommending that the trial court impose a \$10,000 restitution fine (§ 1202.4, subd. (b)) and an accompanying \$10,000 (§ 1202.45) parole revocation restitution fine. The probation officer also recommended that the court impose a "Court Security Fee pursuant to [section] 1465.8 in the amount of \$40," an "Immediate Critical Needs Account (ICNA) fee pursuant to [Government Code section] 70373 in the amount of \$30," and a "Criminal Justice Administration Fee pursuant to [Government Code section] 29550.1 in the amount of \$154.00"

At sentencing, the trial court imposed the following fines and fees:

"The restitution fine I'll set at the statutory minimum of 300, plus 300 to be stayed unless parole or supervision is revoked.

"Court security fee, 40; critical needs fee, 30; administration fee, 154."

²⁵ We emphasize that we do not intend to suggest that the trial court should exercise its discretion to strike the enhancements at issue here; we make no comment as to the propriety of such a decision.

There is a check mark in a box on the minute order, next to the words "CRIM JUSTICE ADMIN FEE ([Government Code section] 29550 et seq.)," and the figure \$154 appears after those words.²⁶ Scott did not object to the imposition of the fines and fees.

2. *Governing law*

a. *Relevant statutory law*

i. *Court operation, conviction, and criminal justice administration fees*

Section 1465.8 provides in relevant part:

"(a)(1) To assist in funding court operations, an assessment of forty dollars (\$40) shall be imposed on every conviction for a criminal offense"

Government Code section 70373 provides in relevant part:

"(a)(1) To ensure and maintain adequate funding for court facilities, an assessment shall be imposed on every conviction for a criminal offense The assessment shall be imposed in the amount of thirty dollars (\$30) for each misdemeanor or felony"

Government Code section 29550.1 provides in relevant part:

"Any city, special district, school district, community college district, college, university, or other local arresting agency whose officer or agent arrests a person is entitled to recover any criminal justice administration fee imposed by a county from the arrested person if the person is convicted of any criminal offense related to the arrest. A judgment of conviction shall contain an order for payment of the amount of the criminal justice administration fee by the convicted person, and execution shall be issued on the order in

²⁶ We interpret this statement to mean that the trial court imposed a \$300 restitution fine (§ 1202.4, subd. (b)), a \$300 parole revocation restitution fine (§ 1202.45), a \$40 court operations fee (§ 1465.8), a \$30 criminal conviction fee (Gov. Code, § 70373), and a \$154 criminal justice administration (booking) fee (Gov. Code, § 29550.1.)

the same manner as a judgment in a civil action, but the order shall not be enforceable by contempt."²⁷

ii. *Restitution fines*

Section 1202.4 provides in relevant part:

"(b) In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record.

"(1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense. If the person is convicted of a felony, the fine shall not be less than three hundred dollars (\$300) and not more than ten thousand dollars (\$10,000). If the person is convicted of a misdemeanor, the fine shall not be less than one hundred fifty dollars (\$150) and not more than one thousand dollars (\$1,000).

"(2) In setting a felony restitution fine, the court may determine the amount of the fine as the product of the minimum fine pursuant to paragraph (1) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted.

"(c) The court shall impose the restitution fine unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record. A defendant's inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution fine. Inability to pay may be considered only in increasing the amount of the restitution fine in excess of the minimum fine pursuant to paragraph (1) of subdivision (b). . . .

"(d) In setting the amount of the fine pursuant to subdivision (b) in excess of the minimum fine pursuant to paragraph (1) of subdivision (b), the court shall consider any relevant factors, including, but not limited to, the defendant's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any

²⁷ Scott refers to fees imposed pursuant to Government Code section 29550.1 as "booking" fees.

economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered losses as a result of the crime, and the number of victims involved in the crime. Those losses may include pecuniary losses to the victim or his or her dependents as well as intangible losses, such as psychological harm caused by the crime. Consideration of a defendant's inability to pay may include his or her future earning capacity. A defendant shall bear the burden of demonstrating his or her inability to pay. Express findings by the court as to the factors bearing on the amount of the fine shall not be required. A separate hearing for the fine shall not be required."

Section 1202.45, subdivision (a) provides, "In every case where a person is convicted of a crime and his or her sentence includes a period of parole, the court shall, at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional parole revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4."

b. *Relevant case law*

In *Dueñas, supra*, 30 Cal.App.5th 1157, 1164, the court held that due process precludes a trial court from "imposing" certain fees and fines when sentencing a criminal defendant in the absence of a determination that the defendant has a "present ability to pay" those fees and fines. Specifically, *Dueñas* held that "due process of law requires [a] trial court to . . . ascertain a defendant's present ability to pay before it imposes" (1) court facilities and court operations fees (under § 1465.8 and Gov. Code, § 70373, respectively), or (2) a restitution fine (under § 1202.4). (*Dueñas, supra*, 30 Cal.App.5th at pp. 1164, 1167, 1172.)

More recently, however, another Court of Appeal opinion questioned whether "*Dueñas*'s expansion of the boundaries of due process" to provide an additional

"protection not conferred by either [of *Dueñas*'s] foundational pillars" is a "correct interpretation," and ultimately concluded that it is not. (*People v. Hicks* (2019) 40 Cal.App.5th 320, 327 (*Hicks*), review granted Nov. 26, 2019, S258946.) In considering the issue, the *Hicks* court noted that *Dueñas* rests on "two strands of due process precedent," (*id.* at p. 326) the first of which "secures a due process-based right of access to the courts," (*id.* at p. 325) and the second of which "erects a due process-based bar to incarceration based on the failure to pay criminal penalties when that failure is due to a criminal defendant's indigence rather than contumaciousness." (*Ibid.*) *Hicks* explains, neither of these strands "dictate[s]" (*id.* at p. 326) *Dueñas*'s result. In fact, *Dueñas* appears to be at odds with the Supreme Court's decision in *In re Antazo* (1970) 3 Cal.3d 100 (*Antazo*), on which *Dueñas* relies for the proposition that "a state may not inflict punishment on indigent convicted criminal defendants solely on the basis of their poverty." (*Dueñas, supra*, 30 Cal.App.5th 1166.) However, in *Antazo*, the Court expressly declined to hold that "*the imposition* upon an indigent offender of a fine [or] penalty assessment, either as a sentence or as a condition of probation, constitutes of necessity in all instances a violation of the equal protection clause." (*Antazo, supra*, at pp. 116, 104–105, italics added.) The *Hicks* court explained, "By adopting an across-the-board prohibition on the very imposition of assessments and fines on indigent defendants, *Dueñas* prohibits a practice that *Antazo* sanctioned (albeit under a different constitutional provision)." (*Hicks, supra*, at p. 327.)

For this reason, and also based on the *Hicks* court's conclusion that *Dueñas* "is inconsistent with the purposes and operation of probation," the court in *Hicks* concluded

that "*due process* does not speak to [the] issue [of how best to balance the competing interests of indigent defendants and an operable court and victim restitution system] and . . . *Dueñas* was wrong to conclude otherwise." (*Hicks, supra*, 40 Cal.App.5th at p. 329, italics added.)

3. *Application*

We find the *Hicks* court's analysis of the due process issue to be persuasive, and agree in particular with its determination that "[h]ow best to balance these competing interests—and what alternatives are best used to keep funding the courts and to continue providing some measure of restitution and solace to our state's crime victims—is a question to which . . . the federal and California Constitutions do not speak and thus have left to our Legislature." (*Hicks, supra*, 40 Cal.App.5th at p. 329.)²⁸

For this reason, we adopt the holding in *Hicks* that "[n]either strand [of due process precedent] bars the imposition of [the] assessments and the . . . restitution fine" in a defendant's case in the absence of a finding that the defendant is unable to pay the fines and fees imposed. (*Hicks, supra*, 40 Cal.App.5th at p. 329.)²⁹ Like the defendant in

²⁸ The People contend that Scott forfeited his claim by failing to object at sentencing to the trial court's imposition of the fines and fees. We exercise our discretion to consider Scott's claim on the merits, notwithstanding any possible forfeiture. (See *Williams, supra*, 17 Cal.4th at p. 161, fn. 6 [reviewing courts have discretion to excuse forfeiture].)

²⁹ While the *Dueñas* court did not address a Government Code section 29550.1 booking fee, Scott contends that "*Dueñas's* due process holding applies equal[ly] to the booking fee, requiring this court to strike it." Thus, our rejection of *Dueñas* applies equally to Scott's claim that the court erred in imposing a booking fee without determining his ability to pay the fee.

Hicks, Scott has not, to date, been denied access to the courts or been incarcerated as a result of the imposition of these financial obligations.

Accordingly, we reject Scott's contention that the trial court violated his right to due process in imposing a \$40 court operations fee, a \$30 criminal conviction fee, a \$154 booking fee and a \$300 restitution fine without determining his ability to pay.

IV.

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court with directions to conduct a mental health diversion eligibility hearing under section 1001.36. If the court determines that Scott qualifies for diversion, then the court may grant diversion. If Scott successfully completes diversion, then the court shall dismiss the charges against him.

If the court determines that Scott is ineligible for diversion or determines that Scott is eligible for diversion but exercises its discretion to not place Scott on diversion, or if the court places Scott on diversion but he fails to successfully complete diversion, then the court shall reinstate Scott's conviction. The court shall thereafter resentence Scott. During any resentencing proceedings, the trial court shall consider whether to exercise its discretion to strike either or both of the serious felony enhancements (§ 667, subd. (a)(1)), in light of the law as amended effective January 1, 2019.

Upon the completion of any resentencing, the trial court shall forward a certified copy of the new abstract of judgment to the Department of Corrections and Rehabilitation.

AARON, J.

I CONCUR:

HALLER, Acting P. J.

GUERRERO, J., concurring in part.

I concur in all portions of the majority opinion with the exception of section III(D), where the majority addresses the merits of Scott's claim that the trial court violated his due process rights by imposing various fees and a restitution fine without determining his ability to pay, and concludes that Scott's due process rights were not violated.

Scott bases his due process claim on the Court of Appeal's decision in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). The *Dueñas* court observed that "[i]mposing unpayable fines on indigent defendants is not only unfair, it serves no rational purpose, fails to further the legislative intent, and may be counterproductive." (*Id.* at p. 1167.) The court therefore held that "due process of law requires the trial court to conduct an ability to pay hearing and ascertain a defendant's present ability to pay before it imposes court facilities and court operations assessments under Penal Code section 1465.8 and Government Code section 70373." (*Id.* at p. 1164.) It also held that "although Penal Code section 1202.4 bars consideration of a defendant's ability to pay unless the judge is considering increasing the fee over the statutory minimum, the execution of any restitution fine imposed under this statute must be stayed unless and until the trial court holds an ability to pay hearing and concludes that the defendant has the present ability to pay the restitution fine." (*Ibid.*)

The validity of *Dueñas* is unsettled, and some courts have disagreed with its legal analysis and conclusions. (See, e.g., *People v. Kopp* (2019) 38 Cal.App.5th 47, 94, 96,

review granted Nov. 13, 2019, S257844 (*Kopp*);¹ *People v. Gutierrez* (2019)

35 Cal.App.5th 1027, 1038 (conc. opn. of Benke, J.); *People v. Hicks* (2019)

40 Cal.App.5th 320, 326, review granted Nov. 26, 2019, S258946.)

Given the procedural posture of this case—where the matter must be remanded for the reasons explained by the majority—and the fact that our Supreme Court will resolve the split in authority as to whether *Dueñas* was correctly decided, I would allow Scott to assert his claim on remand rather than address the merits of his contentions at this stage. I would further require Scott to "bear[] the burden of proving an inability to pay" at any resentencing proceedings (*Kopp, supra*, 38 Cal.App.5th at p. 96; accord, *People v. Santos* (2019) 38 Cal.App.5th 923, 934; *People v. Castellano* (2019) 33 Cal.App.5th 485, 490), and instruct the trial court not to "limit itself to considering only whether [Scott has] the ability to pay at the time" of the hearing. (*Kopp*, at p. 96; see *People v. Staley* (1992) 10 Cal.App.4th 782, 783 [" '[A]bility to pay' . . . does not require existing employment or cash on hand. Rather, a determination of ability to pay may be made based on the person's *ability to earn* where the person has no physical, mental or emotional impediment which precludes the person from finding and maintaining employment once his or her sentence is completed."]; *People v. Jones* (2019) 36 Cal.App.5th 1028, 1035 [future prison wages support ability to pay determination]; *People v. Johnson* (2019) 35 Cal.App.5th 134, 139-140 [same].)

¹ The Supreme Court has limited review in *People v. Kopp, supra*, 38 Cal.App.5th 47, review granted, to the following questions: "(1) Must a court consider a defendant's ability to pay before imposing or executing fines, fees, and assessments? (2) If so, which party bears the burden of proof regarding the defendant's inability to pay?"

In all other respects, I agree with the majority.

GUERRERO, J.